PEMBINAAN KOTA LAKSAMANA (MELAKA) SDN BHD & ANOR

v.

DAMANSARA REALTY BHD & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
MOKHTAR SIDIN J
[CIVIL SUIT NO: D2-22-67 OF 1996]
13 JANUARY 2003

CIVIL PROCEDURE: *Injunction - Ex parte injunction restraining defendants from dealing with property - Application by plaintiffs to extend ex parte injunction - Application by defendants to set aside - Whether injunction contravened rules of court - Whether defendants justified to apply ex parte - Rules of the High Court 1980 O. 29 r. 1(2C)*

The plaintiffs had filed a writ action against the first defendant seeking for specific performances of a property sales agreement, a supplementary agreement and an assignment agreement. The property in the suit was a three-storey hotel, erected on a 2.321 hectares of land ("the hotel land"). In 1996, the plaintiffs applied for and obtained an *ex parte* injunction restraining the defendants from entering into any contract of selling, transferring or charging the hotel and the hotel land. The plaintiffs then applied to extend the injunction until the disposal of their suit against the defendants. On their part, the defendants sought to set aside the injunction arguing that: (i) the injunction should not have been granted *ex parte* because it contravened O.29 rule 1(2C) Rules of the High Court 1980 ('RHC'); (ii) the balance of convenience had favoured the defendants as they were able to satisfy any undertaking unlike the plaintiffs who were unable to satisfy their undertaking; and (iii) the plaintiffs were not justified to proceed *ex parte* in the first place.

Held (extending the injunction):

[1] The injunction did not come within the ambit of the injunction prohibited by O. 29 r. 1(2C) of the RHC as the wordings of the injunction applied for did not purport to stop the scheduled extraordinary general meeting or to stop the shareholders from exercising their voting rights. It was only to restrain the first defendant from dealing with the hotel and the hotel property. (pp 547 h & 548 a-c)

[2] The issue of fortification of damages could only be determined by the facts and evidence presented before the court. There was evidence that the first plaintiff had an asset worth millions in the form of a piece of land and there was no evidence showing that the land was encumbered. The court was satisfied that the plaintiffs had the means to satisfy the undertaking. (p 552 d-f)

[3] The plaintiffs were justified in making the *ex parte* application in order to ensure that the first defendant did not enter into any contract or dealing to dispose of the hotel and the hotel land. The fact that the first defendant had called for the EGM of the shareholders via a newspaper advertisement was concrete evidence of the first defendant's intention to dispose of the subject matter. The plaintiffs only applied for the *ex parte* injunction upon seeing the advertisement. (p 554 c-e)

Case(s) referred to:

Cheah Theam Swee v. Overseas Union Bank Limited [1989] 1 CLJ 157; [1989] 1 (Rep) CLJ 386 HC ***(refd)***

Goh Boon Kim v. Taman Sungai Dua Development Sdn Bhd [1995] 3 AMR 2807 HC ***(foll)***

Intercontex v. Schmidt [1988] 14 FSR 575 ***(refd)***

Kho Ah Soon v. Ooi Kar Seng (Properties) Sdn Bhd [1995] 3 CLJ 812 CA ***(refd)***

Leong Hup Holdings Berhad v. Tuan Haji Ishak Ismail & Ors [1995] 3 CLJ 867 HC ***(dist)***

Sim Seoh Beng v. Kooperasi Tunas Muda [1994] 3 CLJ 382 HC ***(refd)***

Sunseekers Pte Ltd v. Joshua [1990] 1 CLJ 1048 HC ***(refd)***

Tan Kim Seng v. Tan Kim San [1994] 3 CLJ 671 HC ***(dist)***

The Mito [1987] 2 Llyods 197 ***(refd)***

Vapormatic Co v. Sparex Ltd [1976] 1 WLR 939 ***(refd)***

Legislation referred to:

Rules of the High Court 1980, O. 18 r. 19(1), O. 29 r. 1(2C)

Other source(s) referred to:

Spry, *Principles of Equitable Remedies*, 1990, 4th edn, p. 475

For the plaintiffs - CV Das (K Mohan); M/s Shook Lin & Bok

For the defendants - Cecil Abraham (Rabindra S Nathan); M/s Megat Najmuddin Leong & Co

Reported by Yasmin Norhazleena

JUDGMENT

Mokhtar Sidin J:

The plaintiffs filed a writ against the defendants whereby the first plaintiff seeks specific performance against the first defendant in respect of a property sales agreement and the supplemental agreement thereto. The first plaintiff also prays for an order that the first defendant do complete and execute both agreements. The second plaintiff seeks the specific performance of the assignment agreement and the completion of it by the first defendant. On the alternative both plaintiffs seek damages in lieu of specific performance.

According to the statement of claim of the plaintiffs, by an agreement dated 30 October 1990 (hereinafter referred to as "the hotel agreement") the first defendant acquired from Tanjung Tuan Resort Development Sdn Bhd a three-storey, 218-room hotel known as the Regency Hotel erected on a 2.321 hectares of land (hereinafter referred to as "the hotel land") on the terms and conditions contained in the hotel agreement. The first defendant paid RM36,000,000 for the said hotel which was satisfied by the issuance of 32,727,273 new shares at the issue price of RM1.10 each of the first defendant's company to the Tanjung Tuan Resort Development Sdn Bhd. Apparently the Tanjung Tuan Resort Development Sdn Bhd was unable to transfer the hotel land and the hotel thereon because the hotel land is part of the 3.685 hectares of land held by Tanjung Tuan Resort Development under title H.S.(D) 65 for LO 30, Mukim of Si Rusa, Port Dickson. Built on the remaining part of the 3.685 hectares of land is the Tanjung Tuan Condominiums. Furthermore, the said 3.685 hectares of land was charged to MBF Finance Bhd for credit facilities granted to Safuan Holdings Sdn Bhd (hereinafter referred to as the "Safuan Holdings" only) to finance the construction of the hotel and the condominiums. At the material times the Tanjung Tuan Resort Development Sdn Bhd, the first plaintiff and Safuan Holdings had certain common shareholders and directors. The common principals formulated a scheme called the recovery scheme to procure the discharge of the MBF charge and to deliver the hotel property to the first defendant free from encumbrances. The terms of the recovery scheme are contained in an agreement in writing dated 17 April 1993 between the first plaintiff and the first defendant (hereinafter referred to as the "property sales agreement") and varied by an agreement dated 2 December 1993 (hereinafter referred to as "the supplemental agreement") which are the subject matter of this suit. Under the two agreements the first plaintiff was to sell to the first defendant certain reclaimed lands and reclamation rights (hereinafter referred to as "PKL lands and rights") covering an area of 300 acres, granted by the State of Melaka to the first plaintiff under a reclamation agreement dated

18 January 1992. By way of a banking facility granted to the Safuan Group the common principals are to procure the discharge of the MBF charge over the title of 3.685 hectares of land. It is also the terms of the two agreements the first defendant was to sell the hotel land and the hotel thereon to the second plaintiff for a total consideration of RM45 million. This was contained in another agreement dated 24 September 1992 between the second plaintiff and the first defendant (hereinafter referred to as "the assignment agreement").

The purchase by the first defendant of the PKL lands and rights thereto was approved on 10 August 1993. The purchase of the hotel land and the hotel was approved on 22 February 1993. The shareholders of the first defendant at an extraordinary general meeting held on 8 December 1993 approved the transactions. On 3 May 1993, a separate document of title in respect of the hotel land was issued by the Pendaftar Hakmilik Negeri Sembilan. On 29 December 1994, the hotel land was discharged from the charge by MBF Finance Bhd. On 21 September 1995, a meeting was held between Encik Johan Abdullah (representing the first defendant) and Dato' Matshah Safuan (representing the first plaintiff). The solicitors of both parties were in attendance and it was agreed between the parties that all the agreements (the Property Sales Agreement, the Supplemental Agreement and the Assignment Agreement) were to be completed simultaneously. It was also agreed between the parties that the purchase prices stated in those agreements were to be set off against each other as stated in the three agreements on completion of those agreements and that the balance of RM10,000,000 due from the first defendant was to be paid to the first plaintiff. It was further agreed by the parties that the only outstanding issue left was the consent by the State Government of Melaka as to the assignment of the PKL land and rights from the first plaintiff to the first defendant be obtained in order to complete the whole transaction. It is the case of the plaintiffs that the whole transaction was completed as shown by the various correspondences between the parties.

In their statement of claim, the plaintiffs claimed that the Chief Minister of the State of Melaka gave his oral consent to Dato' Matshah Safuan on 10 October 1995 in respect of the assignment of PKL land and rights. On 5 December 1995, the solicitors for the first plaintiff forwarded to the solicitors for the first defendant what was purported to be the written approval of the assignment by the State Government of Melaka. It was conceded by the plaintiffs that the letter dated 5 December 1995 did not reflect the oral consent by the Chief Minister. As a result of that the solicitors for the first defendant gave notice on 15 December 1995 to treat the Property Sales Agreement and the Supplemental Agreement had lapsed and of no effect. The reasons for the first defendant to do so were:

(1) there was no consent in writing from the Melaka Government for the assignment of the PKL land and rights;

(2) the other alleged approvals had not been obtained; and

(3) inordinate delay in completion.

Despite this notice, on 19 December 1995 the first plaintiff forwarded the correct written consent from the State Government to the first defendant implying that the consent letter sent by the solicitors on 5 December 1995 was not the correct consent letter. In the meantime, on 8 December 1995 the solicitors for the first defendant gave notice to the second plaintiff that the

Assignment agreement had lapsed due to the non-completion of the property sales agreement and the supplemental agreement by the first plaintiff. The first defendant treated all the three agreements had been aborted as from 4 December 1995. The first defendant then took steps to dispose of the hotel land and the hotel to the second defendant. Towards this end the first defendant was to hold an extraordinary general meeting of the shareholders of the first defendant on 30 January 1996.

The plaintiffs then filed the present action against the first defendant seeking specific performances of the property sales agreement, the supplemental agreement and the assignment agreement. In the alternative the plaintiffs claim damages for the breach by the first defendant. The writ and statement of claim was filed on 24 January 1996.

On 25 January 1996, the plaintiffs filed an application seeking an *ex parte* injunction to restrain both defendants, whether by themselves, their servants, agents or howsoever from entering into any contract, understanding, commitment of selling, transferring, charging or otherwise dealing with the said hotel and the hotel land. I allowed the *ex parte* injunction subject to the normal conditions for damages and fixed 9 February 1996 to hear both parties in respect of the injunction. On 9 February 1996, the learned counsel for the defendants requested for an adjournment to file an affidavit in reply to the plaintiffs' affidavit. The matter was then fixed for hearing on 18 March 1996 on which day the submissions of the parties were heard. The submissions continued on 20 March 1996. On 14 August 1996, when the parties appeared again for further submissions, I had requested both parties to put in their written submissions. This was due to the fact that the oral submissions were done in bits and pieces and also due to the fact that the affidavits and the exhibits filed were voluminous. The parties agreed to my request. The parties were given time to file their written submissions. Apparently, the parties filed their submissions

sometime in September 1996. By then I had moved to the Court of Appeal and these files were left with the registry of the High Court where they were handled by another judge who dealt with various interlocutory applications. Due to pressure of work, I forgot about the present application until the solicitors wrote to me for my decision. I have requested for the files to be sent to me. The relevant files were sent to me only sometime in September 2002.

Turning to the present applications, there are actually two applications before me. The first is by the plaintiffs to extend the injunction until the disposal of the present suit. The other is by the defendants to set aside the *ex parte* injunction. In my view, the result in respect of both applications, in essence is one, ie, either the plaintiffs are entitled to extend the injunction which mean the defendants' application to set aside the injunction is dismissed and vice versa. The grounds to extend the injunction and to set aside the injunction as can be seen from the affidavits and the submissions are common. For that reason, I will deal with both applications simultaneously.

The learned counsel for the defendants conceded that in the present applications there is a serious question to be decided by the court and that damages would not be adequate remedy. The learned counsel submitted that in view of the concessions by the learned counsel for the defendants, the preservation of the status quo becomes the primary factor in determining whether an injunction should be extended or set aside. The learned counsel for the plaintiffs referred to *Kho Ah Soon v. Ooi Kar Seng (Properties) Sdn Bhd* [1995] 3 CLJ 812 where at p. 817 Shaik Daud JCA said:

> In view of the clear evidence of negotiations with other potential buyers of the said property, I find that there is sufficient evidence of an impending threat to dispose of the said property which in itself calls for the status quo to be maintained until after the disposal of the case. In the light of this and the fact that the learned judge rightly held that there are serious issues to be tried as to whether a concluded contract existed, the balance of convenience must tilt in favour of the appellant. On this score alone the appellant is entitled to maintain the caveat and the injunction.

Further down his Lordship went on to say:

> Looking at the facts of the present case, it seems clear to me that as the learned judge himself has rightly held that there are serious issues to be tried and as there is clear and unrefuted evidence of an actual ongoing negotiation to dispose of the said property to other potential buyers, the balance of convenience and of justice must be in favour of maintaining the *status quo*. Land being a valuable and special commodity once lost, may not adequately be compensated by damages.

In my view, that is sufficient to extend the injunction that I have given earlier.

Anyway, the learned counsel for the defendants submitted that the extension of the injunction is not the issue. The issue here is whether the *ex parte* injunction should in the first place be granted. He then gave the following reasons why the *ex parte* injunction should not be granted:

1. The injunction should not have been granted *ex parte* because it conflicted with O. 29 r. 1(2C) of the Rules of the High Court 1980.

2. The balance of convenience lay in favour of the defendants since on their ability to meet and satisfy any undertaking the plaintiffs were not good for their undertaking; or alternatively, if the balance of convenience favoured the plaintiffs notwithstanding doubts as to their ability to compensate the defendants, that the plaintiffs' undertaking in damages be fortified.

3. That no circumstances were demonstrated such as to justify the plaintiffs proceeding *ex parte* in the first place.

1. Whether The *Ex Parte* Injunction Contravened Order 29 rule 1(2C) of the Rules of the High Court

In respect of this the learned counsel for the defendants submitted that the *ex parte* order dated 29 January 1996 was on an *ex parte* application by the plaintiffs. This *ex parte* application contravened O. 29 r. 1(2C) of the Rules of the High Court 1980 because the effect of the *ex parte* injunction was to stop the holding of a meeting within the meaning of O. 29 r. 1(2C). It was submitted that the first defendant, Damasara Realty Bhd, is a body corporate and that it had called for an extraordinary general meeting of its shareholders which was scheduled to take place on 30 January 1996. The learned counsel contended that the *ex parte* injunction was to stop the holding or progress of the EGM in two steps:

(a) establishing that the meeting would involve acts which were prohibited by the *ex parte* injunction order; and

(b) establishing that consequent upon (a) above, by not being able to proceed with the operative resolution, the "progress" of the EGM was impeded or stopped.

The learned counsel for the defendants then referred to the *ex parte* injunction order of 29 January 1996 was in the following terms:

> an injunction is hereby granted against the Defendants and each of them, whether by themselves, their servants, agents or howsoever be restrained from entering into any contract, understanding, commitment or selling, transferring,

charging or otherwise dealing in the property known as Regency Hotel situated on Pajakan Negeri No. 5 for Lot No. 5628 Mukim of Si Rusa, Daerah Port Dickson, State of Negeri Sembilan.

The learned counsel then referred to the notice dated 15 December 1995 to convene the EGM which was issued to the shareholders of the first defendant which have two resolutions of which it was submitted only the second resolution is relevant for the purpose of the injunction which read as follows:

THAT, subject to the approvals of all relevant authorities, the shareholders do hereby approve the proposed disposal of a plot of leasehold land held under PN 5, Lot 5628, Mukim of Si Rusa Daerah Port Dickson measuring approximately 2.321 hectares together with a three (3) storey hotel constructed thereon known as Regency Hotel to Puteri Hotels Sdn Bhd, a wholly-owned subsidiary of Johore State Economic Development Corporation for a local cash consideration of RM50,000,000 and upon terms and conditions as set out in this Circular AND THAT the Directors of Damansara Realty Berhad be and are hereby empowered to take all such steps and to enter into and execute all agreements, arrangements, undertakings, indemnities, transfers, assignments, guarantees and any acts or things as they may deem necessary or expedient in order to implement, finalise and give full powers to assent to any conditions, modifications, revaluations, variations and/or amendments as may be imposed by the relevant authorities.

The learned counsel further submitted that if this resolution was to be carried out, it would be in breach of the injunction order dated 29 January 1996 because the effect of the approval of the resolution would amount to either "dealing" with the said property or alternatively it would amount to a step in "selling" the said property. As such the proposed resolution was a necessary step to the proposed disposal of the said property. As such that resolution could not be tabled at the proposed meeting because it would breach the *ex parte* injunction order dated 29 January 1996. That being the case, the defendants contended that the restriction imposed by the *ex parte* injunction would have the effect of halting or stopping or impeding the progress of the EGM of the body corporate within the meaning of O. 29 r. 1(2C) of the Rules of the High Court. This is set out in the extract from the decision of Richard Talalla J in *Leong Hup Holdings Berhad v. Tuan Haji Ishak Ismail & Ors* [1995] 3 CLJ 867 where at p. 877 the learned judge said:

.... To my mind then that was tantamount to stopping the progress of the meeting. As I see it the words, "progress of the meeting", contained in the subrule means the advancement of the meeting towards achievement of its avowed object with no room for that advancement to be stopped by injunction given *ex parte* on any ground, be it contrary to law or the governing rules of the body, in this case the memorandum and articles of association of the

company. Stopping can only be ordered after a hearing *inter partes*. Inasmuch as the injunction prohibited the voting I find it had the effect of stopping the progress of the meeting and accordingly it offended against the provisions of subrule (2C) and must now be set aside.

In reply the learned counsel for the plaintiffs submitted that in *Leong Hup Holdings Berhad*, the petitioner sought an injunction to restrain the respondents from holding a meeting to remove the nominees of the petitioner from the board of directors of KFC Holdings. The ground cited by the petitioner in making the application was that in attempting to remove the nominees of the petitioner the respondents contravened the agreement between the petitioner and the respondents. The respondents filed an application under O. 18 r. 19(1) of the Rules of the High Court 1980 to strike out the petition. That application was dismissed. The petitioner then applied for an *ex parte* injunction to restrain the first seven respondents from exercising their voting rights in support of all the resolutions proposed to be moved at an extraordinary general meeting of the company. In doing so the petitioner purported to act under O. 29 r. 1 of the Rules of the High Court. The court refused the application for an ex parte injunction. As to the case of *Tan Kim Seng v. Tan Kim San* [1994] 3 CLJ 671 referred to by the defendants, the learned counsel for the plaintiffs submitted that, that case could easily be distinguished from the present case. In that case the applicant succeeded in obtaining an *ex parte* injunction to restrain the respondent from exercising his voting rights attached to shares in Tan Cheong Leong & Sons Realty Sdn Bhd which the respondent held in trust for Tan Kim Kow. The applicant in that case was not in favour of a resolution to be passed at a scheduled extraordinary general meeting. In an application to set aside the ex parte injunction, Abdul Malek bin Haji Ahmad J (as he then was) at p. 675 said:

> Even if my finding is held to be in error, it is also my considered opinion that this was an injunction to stop a particular shareholder from exercising his voting rights and could well come under the prohibition specified in O. 29 r. (2C) of the rules which states that "Notwithstanding paragraph (2) of this rule, a Judge shall not grant an injunction on an *ex parte* application if the effect is to stop the holding or progress of a meeting of a body corporate, a society, an association, a union, an organisation, a club or a body of persons whatsoever named." Although the order does not actually stop the holding of the extraordinary general meeting scheduled on the 28th March 1994, in my view, the fact that the respondent despite being present at the meeting was restrained from exercising his voting rights had the effect of stopping the progress of the extraordinary general meeting as if he had been able to exercise his voting rights, the decision on the voting of the resolution could well have been different. The fact that it would not be so even without

the order, as alleged by the applicant after obtaining the order, is not the issue. The above stated provision in the rules has made it more than clear that the order should not have been granted.

The learned counsel for the plaintiffs submitted that the two cases cited by the defendants were in respect of *ex parte* injunctions to stop the parties from exercising their voting rights at general meetings. That is not the case in the present application and as such the present application fell outside the scope of those cases. The learned counsel went on to say that the *ex parte* injunction in the present application in their ordinary and natural meaning was not to restrain the holding of any meeting or restraining any person from exercising his voting right. The learned counsel further submitted that the extraordinary general meeting could go on as scheduled and the shareholders of the first defendant were free to vote on the resolutions as stated in the notice. The only thing that the injunction intended to restrain was the act of disposing of the property until the removal of the injunction. The learned counsel then referred to *Goh Boon Kim v. Taman Sungai Dua Development Sdn Bhd* [1995] 3 AMR 2807 and *Sim Seoh Beng v. Kooperasi Tunas Muda* [1994] 3 CLJ 382.

I have gone through the authorities referred to by the learned counsel of both parties and I am of the view that the present application falls within those cases relied by the plaintiffs. In *Goh Boon Kim v. Taman Sungai Dua Development Sdn Bhd* the petitioner had obtained an *ex parte* injunction restraining the respondent from raising any form of capital and/or loan stocks and/or altering its paid up capital. The inter partes hearing of the application was to determine if the injunction should be continued. It was held in that case that the ordinary and natural meaning of the injunction must be construed by reference to the intention that is expressed in the injunction; if the words therein were clear and unambiguous, effect must be given to the language used, regardless of the consequences. The injunction in that case did not restrain the respondent from holding a meeting at all. The injunction applied for was clear and unambiguous in that the respondent should be restrained from raising further capital and/or loan stocks and/or altering its paid up capital and authorised capital. In that case it was held that the injunction did not contravene O. 29 r. 1(2C) of the Rules of the High Court 1980. In *Sim Seoh Beng* it was also held that the injunction did not contravene O. 29 r. 1(2C).

Turning to the present application, it is clear to me from the wordings of the injunction applied for that it was not to stop the scheduled extraordinary general meeting which was to take place on 30 January 1996 or to stop the shareholders from exercising their voting rights. In my view, the EGM could go on and the shareholders could vote to support the resolutions. The injunction did not make any attempt to stop the meeting or to stop the resolutions from being passed.

The injunction obtained was to stop the first defendant from dealing or disposing the hotel and the hotel property. The resolutions if passed would be valid and certainly the injunction did not invalidate those resolutions passed. They are kept in abeyance pending the outcome of the present suit between the parties. To my mind, the effect of the *ex parte* injunction would be the same as if the first defendant had already passed the resolutions and the plaintiffs applied for an *ex parte* injunction to stop the transactions between the first and second defendants. In other words, the *ex parte* injunction had nothing to do with the EGM, it was only to restrain the first defendant from dealing with the hotel and the hotel property.

For the above reasons, I find that there is no merit in the submission of the defendants that the *ex parte* injunction contravened O. 29 r. 1(2C) of the Rules of the High Court 1980.

Undertaking As To Damages

The learned counsel for the defendants submitted that both the plaintiffs were financially unsound and that their undertakings as to damages require fortification. Before dealing with this point, I would like to stress here that for the purposes of the present applications I am looking at the financial positions of the plaintiffs at the time when these applications were made.

The defendants contended that there is clear and serious doubt as to the ability of the plaintiffs to meet and honour any undertaking as to damages. The defendants submitted that Bank Negara Malaysia have appointed receivers over certain assets of the first plaintiff which relates to the Tabung Pemulihan Perumahan. Taking that into consideration there was a clear indication that the overall financial standing of the first plaintiff was precarious. Regardless of the fact that the receivership was appointed to a specific part of the first plaintiff's business, the counsel for the defendants submitted that the appointment of receivers would be wholly unnecessary if the first plaintiff was financially sound. The learned counsel added that looking into the accounts of the first plaintiff for the financial year which ended on 31 December 1992 show that:

(a) There was an operating loss of RM53,509.

(b) There was a term loan comprising RM11,450,000 in principal and RM14,597,756 in interest suggesting that the interest had not been serviced. This term loan was secured by charges over the first plaintiffs assets.

(c) There was a second indebtedness comprising RM36,000,000 owing to Rakyat First Merchant Bankers Berhad.

(d) There were contingent liabilities totalling RM39.5 million.

In respect of the second plaintiffs accounts for the financial year which ended on 31 December 1992, the defendants stated that:

(a) There was an overall accumulated loss of RM37,925.

(b) The turnover shows nil.

(c) The second plaintiff had net current assets worth only RM138,238.

The learned counsel for the defendants also disputed the accounts of the first plaintiff for the financial years 1993, 1994 and 1995. The learned counsel submitted that the accounts were not reliable and they were filed only for the purpose of this injunction especially in respect of the financial year 1995. The observation of the counsel in respect of the financial year 1995 was that it was very unsatisfactory because it shows that:

(a) There was an operating loss of RM55,796.

(b) Term loan of RM800,000 with outstanding interest of RM29,333.

(c) Tax due to the Inland Revenue Department was in the sum of RM399,118 whereas the defendants claimed that the total tax liability of the first plaintiff would be RM2,408,118.

(d) There were contingent liabilities of RM36 million.

The second plaintiff did not file any account relating to the financial years 1993, 1994 and 1995.

From the above, the counsel for the defendants submitted that the plaintiffs were not capable of meeting the undertaking for damages. The learned counsel for the defendants then cited certain passages from Spry's *"Principles of Equitable Remedies"* (4th edn) (1990) at p. 475:

> If, in view of the inadequacy of the plaintiff's financial resources, there is a substantial doubt whether the defendant will be adequately protected by an undertaking by him, the court ordinarily requires either that security be provided for the undertaking or that an undertaking be given by some other person, with security if appropriate.

At p. 476:

> If the Plaintiff's undertaking is inadequate and he is also unable to provide either sufficient or an adequate undertaking by another person, this consideration is taken into account by the court in deciding whether the most just course is that an injunction should be granted. According to the various risks that arise and the other relevant circumstances it may be appropriate either that no injunction be granted, or that an injunction be granted with

> the most effective undertaking or undertakings that can be procured, with or without security, or, in very exceptional cases, that an injunction be granted without an undertaking at all.

He then referred to the statement of Hirst J in *The Mito* [1987] 2 Llyods 197:

> May I make it plain at the start that there is no doubt in my judgment that the Court has power at the time of either granting or extending a Mareva injunction to order security in support of the usual cross-undertaking, in other words to fortify the injunction by security in the manner which was ordered, for example, by Mr. Justice Roxburgh in the case of *Baxter v. Claydon* [1952] WN 376. In other words if the Court considers that the cross-undertaken, usually the plaintiff, might not be worth powder and shot if it be held that he is obliged to fulfil his cross-undertaking, the Court can strengthen the undertaking by requiring some sort of security.

The learned counsel for the defendants went on to submit that the onus is on the plaintiffs to demonstrate their capability to satisfy the undertaking when challenged and not on the defendants as had been held in *Intercontex v. Schmidt* [1988] 14 FSR 575; *Cheah Theam Swee v. Overseas Union Bank Limited* [1989] 1 MLJ 426; and *Vapormatic Co v. Sparex Ltd* [1976] 1 WLR 939. In *Intercontex v. Schmidt* where it was stated at p. 576:

> The plaintiffs had provided no proper evidence that they would be able to satisfy their cross-undertaking in damages.

Shankar J in *Cheah Theam Swee v. Overseas Union Bank Limited* at pp. 441 and 442 said:

> A bare undertaking as to damages may be "usual" as to form, but useless as to content unless the Plaintiffs are worth powder and shot. I therefore hold it to be the right of the defendants to be told what the undertaking is worth in real terms.

In *Vapormatic v. Sparex Ltd,* Graham J at p. 941 said:

> It is important that the court should be satisfied that the Plaintiff is good for any damages which might ultimately be ordered against him on the cross-undertaking. Normally then, it is only prudent that a Plaintiff, asking for such an injunction *ex parte*, should produce specific evidence that he is good for such damages.

Turning to the present application the learned counsel submitted that the fortification of undertaking for damages would be the difference of prices between the one agreed upon by the second plaintiff (RM45 million) and the one offered by the second defendant (RM50 million), which is RM5 million.

In his reply, the learned counsel for the plaintiffs submitted that the defendants relied solely on the liability figures of the first plaintiff as stated in its annual accounts for those financial years stated above. The defendants when looking only on the liability side did not paint an accurate picture of the financial status of the plaintiff. The normal and correct way of looking into the accounts was to view them as a whole to find out the nett position of the plaintiff. For that purpose the nett position of the plaintiff for the accounting years of 1992, 1994 and 1995 are as follows:

(1) PKL's 1992 Accounts (encl. 15 p. 2)

(a) Net current assets	RM2.5 million
(b) Net total assets (after deducting liability)	RM 16.3 million
(c) Profit	RM106,491

(2) PKL's 1994 Accounts (encl. 19 p. 179)

(a) Net current assets	RM 2.5 million
(b) Net total assets	RM 16.3 million

(3) PKL's 1995 Accounts (encl. 25)

(a) Net current assets	RM 12.8 million
(b) Net total assets	RM 26.6 million

The learned counsel went on to submit that the substantial assets of the first plaintiff was in the form of land which was the subject matter of the agreements between the plaintiffs on the one part and the defendants on the other. Assuming that the plaintiffs failed in their action the land asset would be able to meet the undertaking. Without going into the actual value of the land but based on the willingness of the first defendant to pay for the land, it would be more than sufficient to meet any losses suffered by the defendants. Furthermore, it was not disputed that both plaintiffs belong to the Safuan Group of Companies where it had been shown that the group was the recipient of probably the largest banking facilities ever granted to a single customer by Bank Bumiputra Malaysia Berhad which was RM170 million. This shows that the plaintiffs were capable of meeting the undertaking given.

The learned counsel further submitted that it was not sufficient for the defendants to show the plaintiffs' financial standing in order to justify the fortification, the defendants must be able to show to the court what would be the likely losses that they would suffer because of the injunction. The affidavits filed by the defendants did not make any assessment of losses or anticipated losses because of the injunction. The terms and conditions of sale of the hotel and the hotel property to the second defendant were not stated in the affidavit and as such there was no completion date between the parties. That being the case the injunction did not affect the sale transaction between the two defendants. It was also submitted that if the defendants require fortification of undertaking, it was vital for the defendants to show the likelihood of significant loss arising from the injunction and the loss were the natural consequences of the injunction as decided by *Sunseekers Pte Ltd v. Joshua* [1990] 1 CLJ 1048 HC.

After hearing the submissions it is clear to me the issue of fortification could only be determined by the facts and evidence made available to me through the various affidavits and the exhibits filed therein. I must act on what had been made available to me. It is clear to me from the evidence made available that the first plaintiff have the asset in the form of land which is the reclaimed land and the rights which is part of the transactions between the parties and the value is more than RM20 million. There is no evidence to show that this asset is encumbered. This by itself is sufficient to meet the undertaking. I could not close my eyes to the fact that the two plaintiffs belong to the Safuan Group of Companies. When Bank Bumiputra Malaysia Berhad was willing to give banking facilities in the sum of RM170 million there must be a basis for the bank to do so, maybe the assets of the group were enough to cover the facilities given. As such I am satisfied that the plaintiffs have the means to meet the undertaking given even the amount of RM5 million as requested by the defendants. For that reason I agree with the learned counsel for the plaintiffs that at the time when these applications were made no fortification of undertaking was necessary.

For the reasons above, I am refusing the application for fortification of undertaking as requested by the defendants. The undertaking given by the plaintiffs is sufficient.

Whether Plaintiffs Are Justified In Going Ex Parte

The learned counsel for the defendants questioned the plaintiffs' action in applying for an *ex parte* injunction after an advertisement appeared in the papers on 15 January 1996 calling for the shareholders' meeting of the first defendant. The learned counsel submitted that the plaintiffs knew by the latest on

15 December 1995 that the first defendant had terminated the arrangements and the second plaintiff knew the assignment had lapsed on 8 December 1995. The plaintiffs could have filed the action as soon as the first defendant terminated the agreements. There was a gap of one month in between the termination and the advertisement. The plaintiffs could proceed with inter partes application and not *ex parte*. The learned counsel then cited the statement of Edgar Joseph Jr J (as he then was) in *Lim Hean Pin v. Thean Seng Co Sdn Bhd & Ors* [1992] 2 CLJ 828; ([1992] 2 CLJ (Rep) 745) at p. 836 (p. 756)

> It was submitted by counsel for TSS that given the circumstances of this case it was not appropriate for the plaintiff to have applied *ex parte* for the injunctions.
>
> I recognize that *ex parte* procedure will only be appropriate either where the delay occasioned by notifying the defendant may cause to the plaintiff irreparable damage, or where secrecy is essential. So, for example, in *Bates v. Lord Hailsham of St Marylebone* Megarry J (as he then was) said: '*Ex parte* injunctions are for cases of real urgency, where there has been a true impossibility of giving notice of motion'.

The learned counsel further submitted that the EGM itself posed no threat to the plaintiffs and as such there was no real urgency in applying for an injunction by way of *ex parte*. The *ex parte* application was an abuse and should not be allowed. Furthermore, the titles in respect of the hotel and the hotel land were in the hands of the solicitors for Bank Bumiputra Malaysia Berhad and they were safe.

The learned counsel for the plaintiffs pointed out that there was an urgency in applying for an *ex parte* injunction. The fact that the first defendant called the EGM of the shareholders was enough evidence to show the first defendant's intention to dispose of the subject matter. An injunction had to be obtained urgently to ensure that the first defendant did not enter into any contract or dealing to dispose of the hotel and the hotel land. The first defendant could well enter into an agreement to dispose the hotel and the hotel land even before getting the mandate from the EGM. As such, the learned counsel submitted that there were ample justification in making the *ex parte* application.

The evidence before me clearly shows that the time difference between the termination and the advertisement was only about a month. Even after the termination, the first plaintiff sent the official consent from the State Government of Melaka showing that the terms and conditions had been met. Apparently, this was ignored by the first defendant. From the evidence it is clear to me that the first plaintiff had fulfilled the last and final condition in respect of arrangements, maybe a little bit out of time. It is to be noted that the

arrangements between the first plaintiff and the first defendant were made more than two years ago. I could not see the reason why the first defendant could not wait for a few more days for the official consent. It is clear to me that the first defendant had the very intention of not proceeding with the arrangements. Though the advertisement calling for the EGM appeared on 15 January 1996, it appears to me that the negotiations between the first defendant and the second defendant had been going on for sometime. I would not be wrong to say that the negotiations were done before the termination because there were specific terms contained in the resolutions. Bearing in mind that the subject matter where the sum involved is considerably huge it was near impossible for the parties to come into terms within a period of one month. I agree with the learned counsel for the plaintiffs that by the advertisement there was already a clear intention by the first defendant to dispose the subject matter urgently in order to defeat any claim by the plaintiffs. From the evidence it is clear to me there is real urgency to stop the deal between the two defendants. The only way to stop the transactions between the two defendants was for the plaintiffs to apply for an *ex parte* injunction. In my view, the plaintiffs were justified in making the application. As to the delay in making the application, it is clear to me that the plaintiffs acted promptly and there was no delay on their part in making the applications. As I have stated earlier, the whole incident occurred within a month. It is clear to me that the plaintiffs could not file an *ex parte* injunction earlier because there was no concrete evidence to do so. The evidence of disposal came out only when the advertisement appeared.

For the above reasons, I find that there was no delay on the part of the plaintiffs in making the *ex parte* application. I am satisfied that there are ample evidence to justify the plaintiffs' action in applying for an *ex parte* injunction and it is not an abuse of the process of the court.

Conclusion

For the reasons stated above, I would allow the application by the plaintiffs for the injunction to be extended until the disposal of this case.

The defendants' applications to set aside the injunction and the fortification of the undertaking for damages are hereby dismissed. Costs to the plaintiffs.